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## Focus on Comparison in Comparative Law, A

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# A Focus on Comparison in Comparative Law

Kirk W. Junker\*

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The common law was not developed in the university, but in the inns of court, in the law offices of practitioners and in the courtrooms of adversarial advocacy. As such, it was not developed as an academic discipline. So which disciplines did form the foundation of the formal education that lawyers had during the development of the common law? The historical record will show that lawyers in both the civil and common law traditions were being taught the foundational training and practices of rhetoric. With this general thesis in mind, one can consider rhetoric's topic of comparison. In the ancient art of rhetoric, the common *topoi* (topics) included relationship, circumstance, testimony, definition and comparison. For this present article, I will focus only upon comparison. Definition, as it turns out, may well be a trend in the way of seeing the world, just as atomism was a trend in the way of seeing the world in the natural sciences before systems began to be taken seriously as non-reducible to their parts; that is, as not being atomic. Thus, a shift to comparative thinking and study in the law and a shift away from definitional thinking in the law well might be part of the *Zeitgeist* of globalization. The question to be addressed is whether this is the time for comparativism.

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## I. GLOBALIZATION—THE LATEST IN THE HISTORY OF COMPARATIVE LAW EXIGENCIES

In many Western consumer industries—clothing, furniture, automobiles, electronics, and entertainment, for example—fashion is determined by the whim of those who have the power to profit from their ideas. Does that include intellectual fashion? Can it be manipulated intentionally? Does intellectual fashion come about as a response to a perceived crisis? Indeed it does. Globalism is one such perceived crisis. To the profiteers of the market, globalism is expressed as a positive thing—more and bigger markets and supply chains. But for those who are not in dominant cultures, for those who either cannot or choose not to profit from their ideas, globalism can be a threat. Is the study and practice of law a market commodity or an expression of culture? During an era of globalization, if a particular culture is not a dominant one, the culture stands the risk of losing the features of its legal system that are unique to the culture. Globalism is the latest exigency that emphasizes the need to employ comparative law, and it merits a focus upon comparison itself.

### A. *A History of Law's Comparative Practices*

Where has the focus in comparative law been until now? Why do we compare? Too often, foundational questions such as why one compares and whether comparative law goals are really achievable are ignored. Instead, we jump ahead immediately into the method of *how* one compares or worse, just start making unmethodical juxtapositions without asking why or how. Even before comparative law had a disciplinary status or a name, practitioners of law looked outside their own systems. Already in the eleventh and twelfth centuries, the historical record indicates practices that we might today call “comparative.” “[T]he jurists observed that *in all the various legal systems under examination* the question arose whether one who was forcibly dispossessed of his goods has the right to take them back by force.”<sup>1</sup> The author of the 1231 *Liber Augustalis*, a codification of the law of the Kingdom of Sicily, was “moved by the spirit of scholasticism that informed the intellectual life of the age to resolve differences within the existing legal tradition of the *regno* and to distill his legal knowledge

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1. HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 153 (Harvard University Press 1983) (emphasis added).

and that of his associates, probably practical men of the courts, into a unified body of law . . . .”<sup>2</sup>

But although the practice of comparison has been with us from inside the law for some time, the practice is most often silent on the nature and workings of the very act of comparison itself. For example, my own informal survey of many well-known scholars working today found that their institutions list their areas of research as including comparative law, but a review of the titles these scholars publish indicates little talk of comparison. Instead, the titles seem to indicate that the scholar is active in at least one foreign language and one or more foreign legal system that practices law in that language, but nowhere do these titles talk about comparison per se. John Henry Merryman has noted that the study of foreign law is what “most comparatists do in fact most of the time.”<sup>3</sup> Consequently the nature of the comparisons is done uncritically, as though there is some “natural,” one and right way to do it. It would be more accurate and helpful to keep separate a category of scholarship called “foreign law,” in which persons trained in one tradition and language serve the important function of reporting on other traditions and languages to persons for whom the others are foreign.

There are other reasons why one might rightly distinguish the study of foreign law from comparative law. In their canonical treatment of comparative law, Konrad Zweigert and Hein Kötz have agreed that the “mere study of foreign law falls short of being comparative law.”<sup>4</sup> Unfortunately, the majority of literature fails to heed that admonition. Perhaps the distinction is blurred be-

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2. JAMES M. POWELL, *THE LIBER AUGUSTALIS OR CONSTITUTIONS OF MELFI*, PROMULGATED BY THE EMPEROR FREDERICK II FOR THE KINGDOM OF SICILY IN 1231 xxi (Syracuse University Press 1971), quoted in BERMAN, *supra* note 1, at 427. It is also worth noting here that, as with the common law, the knowledge of “the practical men of the courts” was part of the unified body of Sicilian law.

3. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 675 n.18 (2002) (citing JOHN H. MERRYMAN, *THE LONELINESS OF A COMPARATIVE LAWYER* 4 (1999)). In that same footnote, Reimann notes that “Looking through the volumes of the American Journal of Comparative Law, one quickly recognizes that almost invariably, the articles about foreign law outnumber (often by a huge margin) those explicitly comparing two or more systems.”

4. KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 6 (Tony Weir trans., 3d ed. 1998). Reimann notes that “Indeed, foreign legal studies (‘Auslandsrechtskunde’) would be a more precise term.” Reimann, *supra* note 3, at 675 n.17 (citing MAX RHEINSTEIN, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 22 (2d ed. 1987)). American literary critic Kenneth Burke said of his own work that he was most uncomfortable when he disagreed with Aristotle. I should feel the same about disagreeing with Zweigert and Kötz.

cause anyone who is studying something that he would call “foreign” must be doing so while standing in his or her own legal system. While an author of such a study may not explicitly talk of comparison, he or she is of course comparing. When studying a foreign legal system, we cannot avoid comparing it to our own, at the very least. But it is important to become cognizant that we are comparing. Successful comparative law study must bring one’s comparisons to consciousness and not act as though they are fixed and non-negotiable. Even when the theme of a work does not make its comparative thought explicit, evidence of an author’s comparative practices may be found in the preface, foreword and other marginalia of his or her work.<sup>5</sup>

Mathias Reimann notes that “outside of a small hard core, most of those engaged in comparative work of one sort or another do not even think of themselves (primarily) as comparative lawyers but mainly as Asia specialists, Russian law scholars, constitutional lawyers with comparative interests, etc.”<sup>6</sup> And yet if these scholars and lawyers are specializing in legal cultures other than their own, they must be doing so by way of comparison with their own legal culture.

As an aide to focus on the concept of comparison, one can begin by looking at when and why comparative law came into being as a separate discipline of its own. In reflecting upon such considerations, comparativist Paul Koschaker persuasively concluded that legal comparison is not possible, only comparative legal history is possible.<sup>7</sup> A neatly-packaged history of the schools of thinking in comparative law is not readily possible because there are not clean breaks over time with any one “ism” (formalism or functionalism, for example), and besides, most scholars do not reside neatly in any one school. Nevertheless, some approximations in both history and intellectual camps are helpful. Legal historian Frederick G. Kempin asserts that “[l]egal history can dispel many commonly held misconceptions. One is that the common law is held in the iron bands of tradition through the doctrine of precedent. But precedent is little more than comparing present cases with past

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5. Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law* 26 HARV. INT’L L.J. 411, 443 (1985).

6. Reimann, *supra* note 3, at 687.

7. Paul Koschaker, *Was vermag die vergleichende Rechtswissenschaft zur Indogermanenfrage beizusteuern?* FS Hirt, Vol. 1, 145, 150 (Heidelberg, 1936), quoted in BERNHARD GROSSFELD, CORE QUESTIONS OF COMPARATIVE LAW 239 (Vivian Grosswald Curran trans., Carolina Academic Press 2004).

cases.”<sup>8</sup> Thus, Kempin goes so far as to say that the practice of making and applying common law is in fact *constituted* by comparison. But is the comparison practiced by a common law lawyer the same as that practiced by a civil law lawyer?

To answer this question, it remains important to note that as a discipline, comparative law cannot approach its topic from a neutral or omnipresent position. At a minimum, common law lawyers approach comparative law differently than civil lawyers do, because their point of departure differs. And here we learn that at the great Paris Exposition in 1900, the International Congress for Comparative Law introduced comparative law in the form in which we know it today. The spirit of that age was “progress.” The goal of the Congress, as recorded by its reporter, Edouard Lambert, was a *droit commun de l’humanité*. (law common to all of humanity). He went on to describe the noble goal that:

[C]omparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergences in law, attributable not to the political, moral, or social qualities of the different nations, but to historical accident or to temporary or contingent circumstances.”<sup>9</sup>

So at the height of the world’s love affair with industrial progress, it was thought by Edouard Lambert and the others present at the International Congress for Comparative Law that it was not only possible to distill a world private legal system from comparing all those existing already, but that it was desirable to do so.

In the century or so that comparative law has been researched and practiced as such, its goals and theories have changed. The optimism of that purpose eroded with the passage of time during which a world system was not forthcoming, soured by the discordance of two world wars and a lengthy cold war.<sup>10</sup> Nevertheless,

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8. FREDERICK G. KEMPIN, HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW (3d ed. West Publishing Company 1990).

9. ZWIEGERT & KÖTZ, *supra* note 4, at 3. Note that the Congress sought a similar goal in 1900 as the Liber Augustalis author sought in 1231—“to resolve differences.”

10. Although it should be noted that as recently as 1989, physicist Werner Heisenberg still wrote “If one looks around in history as to what great capacities human societies hold, next to the primitive same-race feelings that are prevalent already in the animal kingdom, is the shared language. But in addition to these strengths are two more still, which are stronger and can bring together even peoples of different races and languages: a common faith and, strongest of all, a common law.” WERNER HEISENBERG, ORDNUNG UND WIRKLICHKEIT, 152 (Piper Munich/Zurich 1989), *cited in* GROSSFELD, *supra* note 7, at 232.

unperturbed by the First World War, French lawyer Pierre Lepaulle, writing in the *Harvard Law Review* in 1922, claimed that the war was evidence of an even greater need for comparative law because “divergences in laws cause divergences that generate unconsciously, bit by bit these misunderstandings and conflicts among nations which end with blood and desolation.”<sup>11</sup> One must of course remain conscious of one’s stated focus and goal in any comparative law enterprise. For example, the European common market, established by the legal acts of treaties, became a legal reality in order to prevent a third world war. When José Manuel Barroso, President of the European Commission, is asked with every new “crisis” in the EU, whether the EU is successful, he answers without hesitation that it is, and quickly continues to say that Europe has not started another world war since the EU began. Perhaps a similar, though lesser claim could be made about the United Nations. Both examples echo Lepaulle’s point that when cultures are in dialogue, through some institutionalized means, they are less prone to war.

While avoiding war is a large and noble goal for comparative law, there are other, more direct and personal goals for comparative law as well. Lepaulle added:

If I may state a personal experience, I never completely understood French law before coming to the United States and studying another system. History of law seems inadequate to give the student this sense of relativity, because in history we often deal with forces which are not yet dead, which still unconsciously bend the mind of the student in a certain direction. To see things in a true light, we must see them from a certain distance, as strangers, which is impossible when we study any phenomena of our own country. This is why comparative law should be one of the necessary elements in the training of all those who are to shape the law for societies . . . .<sup>12</sup>

There are many other reasons why one might compare legal systems or legal families. Respected comparativists René David and John E. C. Breierly summarize three reasons to compare as follows: “it is useful in historical and philosophical legal research; it

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11. Pierre Lepaulle, *The Function of Comparative Law With a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838, 857 (1922).

12. *Id.* at 858.

is important in order to understand better, and to improve, one's national law; and it assists in the promotion of the understanding of foreign peoples," thereby developing favorable contexts for international relations.<sup>13</sup>

Günter Frankenberg asserts that "The ultimate aims of comparative law [are]—to reform and improve the laws, to further justice and to better the lot of humankind . . . ."<sup>14</sup> From his own survey of the biggest names in the comparative law field—René David, Mary Ann Glendon, John Henry Merryman, Max Rheinstein, Rudolph B. Schlesinger, Konrad Zweigert and Hein Kötz—Mathias Reimann summarizes the reasons to teach comparative law from the authors of what one might consider to be the canon of comparative law:

- 1.Foreign models may improve domestic law;
- 2.Comparative law practice promotes international unification or at least harmonization;
- 3.Comparative law study and practice reveals the common core of all law;
- 4.Comparative law study teaches the basic skills of international legal practice;
- 5.The study of comparative law provides overview of law on a world-wide scale by introducing the student to the major legal families, or at least provides knowledge of foreign legal families;
- 6.The study of foreign law familiarizes students with foreign rules, concepts, and approaches and thereby facilitates communication with foreign lawyers;

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13. R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 4 (2d. ed. 1978), quoted in Frankenberg, *supra* note 5, at 418.

14. Frankenberg, *supra* note 5, at 412-13 (citing K. ZWIEGERT & H. KÖTZ, *supra* note 4, at 12-14, 19-23; A. Tunc, *La contribution possible des études juridiques comparatives à une meilleure compréhension entre nations*, 16 *REVUE INTERNATIONALE DE DROIT COMPARÉ* [R.I.D.C.] 47 (1964); A. Tunc, *Comparative Law, Peace and Justice*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 80 (A. Mehren & J. Hazard eds., 1961); Ferdinand F. Stone, *The End to be Served by Comparative Law*, 25 *TUL. L. REV.* 325 (1951); René David, *The Study of Foreign, Law as a Contribution Towards International Understanding*, 2 *INT'L SOC. SCIE. BULL.* 5 (1950); Hessel E. Yntema, *Comparative Law and Humanism*, 7 *AM. J. COMP. L.* 493 (1958)).



7. By forcing students to compare foreign law with their own, it forces them to be critical of their own system;

8. The study of comparative law helps students to understand law as a general phenomenon, in particular its contingency on history, society, politics, and economics; and

9. By providing critical perspectives and explaining alternatives, the study and practice of comparative law fosters tolerance towards other legal cultures and thus overcomes parochial attitudes.<sup>15</sup>

Using this brief historical survey of the reasons that scholars have given for comparison, and after answering the question of why we should compare, we further the process by asking *how* one makes comparisons within the law (generally), then ask how one compares specific legal phenomena, and then finally, ask what conclusions are warranted from an exercise in comparison.

#### *B. The Comparative Law Orthodoxies of Method*

A study of the history of comparative law yields some trends in method. And so the history of comparative law may be told as a history of the orthodoxies of method, whether they were consciously or unconsciously employed. Regardless of the reason why one compares parts or whole legal systems, one must proceed methodically in order to compare intelligently. As Paul Koschaker warned in 1935, "bad comparative law is worse than none."<sup>16</sup> For example, bad comparative law might simply look to compare texts (usually in some language of translation, perhaps for both countries). Even if the codes or procedural rules of two systems appear superficially to be very similar, they will often provide an unreliable comparison: "For example, some aspects of Dutch procedures . . . bear a striking resemblance to recent proposals for new procedures in the Scottish courts. Yet we can be certain that if the Scottish proposals were to be implemented, the Scottish courts would still work very differently from the Dutch courts."<sup>17</sup> To make useful

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15. Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49, 54 (1996).

16. Koschaker, *supra* note 7, at 149-50, *quoted in* GROSSFELD, *supra* note 7, at 14.

17. Judge David Edward in "Fact-Finding: A British Perspective," in 14 THE OPTION OF LITIGATING IN EUROPE 44 (D.L. Carey Miller and Paul R. Beaumont eds., British Inst. Of Intl and Comparative Law 1993), *quoted in* Jeremy Lever, *Why Procedure is More Im-*

comparisons in the law, one must know more than the words of texts.

However one arrives at the method of comparison that one employs, he or she must give serious consideration to the choice. Why? To begin with, a student or practitioner outside a particular legal society *cannot* study law in the same way that a person within that society would study its law. Learning language produces a good analogy here.<sup>18</sup> We learn our native language by usage, and learn that usage in the context of its native spoken culture. We learn additional languages through the methodical mechanics of grammar and vocabulary, outside of the native cultural context. Therefore, we should be wary of the mechanical artificialities, out of context, when learning additional legal cultures and making comparisons. Even the native who does not study the law as a legal specialist has learned the values, norms and procedures in that law, at some level, from everyday experience in his or her culture. Some of the things a native of any culture learns about his legal system might even be regarded by legal professionals as being wrong, but if it is generally learned in that culture, it is a force that forms general cultural expectations among the natives and cannot be dismissed. Equally important is the fact that one should not study a foreign society's law, out of cultural context, as though it is just another substantive law course or practice area in one's own system.

Weak comparisons, typical of colonization justifications, begin with the assumption that what one already does is natural or normal, and if another person or culture does things differently, then that other person or culture is therefore unnatural or abnormal. This seems to be more commonly accepted among non-comparativists and even among those who are neither comparativists nor lawyers, such as the German television journalist who telephoned me when Dominique Strauss-Kahn was arrested in New York and demanded to know why "American" law allowed Mr. Strauss-Kahn to be shown in handcuffs and allowed cameras in the courtroom. Of course, in the journalist's own culture both were prohibited, so to him the prohibition of either must be natural and normal. "The similarities that surface in the course of such comparisons are mirror images of the categories of the con-

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portant Than Substantive Law, 48 International and Comparative Law Quarterly 285, 301 (April 1999).

18. *Infra* we will see that language functions in an even greater role than as analogy.

ception of law in the comparativist's own culture. Ambiguities are defined away or adjusted to fit the model; thus the 'home' law is positioned as natural, normal, standard . . . ."<sup>19</sup> Correcting for one's native bias is one of the thorniest problems in comparative law scholarship and practice. Can these biases be corrected simply by recognizing them? Perhaps. In criticizing the status quo of comparative law, Günter Frankenberg writes:

The comparatist approaches her field of research purely as philosopher, historian, sociologist or legal scholar; her task is merely to collect interesting items, to systematize, to develop or unify the law and/or to bring about rational change. . . . They call for an objectifying methodological approach or trust that international collaborations will correct national biases. They modestly propose rules of comparative reason, that if every comparatist follows will control subjectivity.<sup>20</sup>

Rather than look for an introduction to comparative law written from one's own perspective, so as comfortably to ignore the fact that we are viewing the phenomenon from only one perspective, we can benefit from the perspectives of others who react to, and analyse its functionality. At the same time, one must however remain observant of the functionality principle, even while criticizing it. While functionalism may have problems and faults, the fact remains that if we want to compare legal traditions, there must be something we are comparing, and for the comparison to be worthwhile, the things compared should in some way be justifiably comparable. Some authors like James Gordley would compare black letter law and say civil and common law cultures are converging. The mixing of systems within the European Union contributes to this phenomenon. "It is worth noting, however, that English judgments nowadays, by reason of the incorporation of Community law and the European Convention of Human Rights use such abstract concepts [as principles, freedoms and rights]

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19. Frankenberg, *supra* note 5, at 423. In the spirit of the critical legal studies relative, post-modernism, one can turn this critique back on Frankenberg and note that he too is too much wed to continental civil law when he says "In order to find, compare and evaluate these effects, the comparativist has to move back and forth between texts and their application." Such a characterization of law omits both customary law and the oral tradition, and assumes that at its foundation, law is a text.

20. *Id.* at 424-25, referring to Zweigert and Kötz as well as Ernst Rabel's statement "If the picture presented by a scholar is colored by his background or education, international collaboration will correct it," in Ernst Rabel, *Deutsches und Amerikanisches Recht*, 16 *Zeitschrift für Ausländisches und Internationales Privatrecht* 359 (1951).

more than in the past.”<sup>21</sup> But if instead of comparing the black letter law one compares the mentalities of the practicing lawyers, as does Pierre Legrand, one might well conclude that there is no convergence.<sup>22</sup>

A simple attempt to correct for the bias of assuming one’s own norms to be standard comes to us through formalism. Given that formalism was a trend in other disciplines at the time, it should not be a surprise if one might trace a thread of formalist method in comparative law back to the beginning of the twentieth century.<sup>23</sup> “Formalism prompts a narrow conception of law that, in a comparative perspective, is informed by the domestic legal culture and then projected onto what in other historical or social contexts is, looks like or may be taken as law.”<sup>24</sup> In comparative law, formalism theorizes law as a “set of rules and principles independent of other political and social institutions.”<sup>25</sup> An alternative approach to formalism would be to treat foreign law as a topic of domestic law; that is to say, just another course in a student’s domestic curriculum, like taxation or wills and estates, such that he then uncritically and unreflectively takes what he knows already of law, and plugs in foreign law as though it were just new rules within one’s own system.

From the formalist roots that often beset the beginning of attempts to systematize or scientize a discipline, comparative law then drifted into functionalism. Private practitioners who wish to represent the interests of their clients are likely to use the functionality approach. “Functionality becomes the pivotal methodological principle determining the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and the evaluation of findings.”<sup>26</sup> Functionalism rejects formalism in part and incorporates formalism in part. The great proponents of functionalism, Konrad Zweigert and Hein Kötz, reduce all comparative law method to functionalism: “The basic methodological principle of all comparative law is that of functionalism. . . . Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill the

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21. Sir Konrad Schiemann, *From Common Law Judge to European Judge*, EUROPÄISCHES PRIVATRECHT (ZEUP) HEFT 4, 742 (2005).

22. Reimann, *supra* note 3, at 690 n.109.

23. Frederick Schauer, *Formalism*, 97 YALE L.J. 509 *passim* (1988).

24. Frankenberg, *supra* note 5, at 422.

25. BLACK’S LAW DICTIONARY 913 (7th ed. 1999).

26. Frankenberg, *supra* note 5, at 436.

same function."<sup>27</sup> The great assumption upon which this method must be based is that "[t]he proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results."<sup>28</sup>

This *praesumptio similitudinis* (presumption of similarity) is not without its critics. A weak point in the functionalist method, including that of Zweigert and Kötz, is that it begins from a presumption that legal systems of the world are sufficiently similar such that one can find similar functions among them. As a result of this presumption, Zweigert and Kötz go so far as to say that if at the end of research one discovers "diametrically opposite results, he should be put on notice to go back to check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough."<sup>29</sup> With this in mind, analyses can only be conducted if the questions used are capable of yielding similarities, regardless of how well those similarities represent the practices of lawyers in those systems. It would be equally as logical to begin from the presumption that legal systems are dissimilar enough that no similarities can be found. Both assumptions put a rabbit in the magician's hat that pre-determines the outcome of the comparison.

Functionalism seems especially to have an affinity for commercial law. So for example, legal origins scholarship "produced primarily by economists, not legal scholars—has a close affinity with functionalist comparative law."<sup>30</sup> Commercial law and some other areas of the law are less culturally-connected than other areas of the law.<sup>31</sup> When the specifics of a culture are not at issue, the law's norms and forms are more easily transferred to another culture and may be understood by lawyers in multiple cultures with-

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27. ZWIEGERT & KÖTZ, *supra* note 4, at 34.

28. *Id.* See also, Zweigert, *Die Praesumptio Similitudinis als Grundsatzvermutung rechtsvergleichender Methode*, in *Inchiesete di Diritto Comparato—Scopi e Metodi di Diritto Comparato* 735 (M. Rotondi ed 1973 as cited by Frankenberg, *supra* note 5, at 437). Critiques of this presumption of similarity are found at 3 L. Constantinesco, *Rechtsvergleichung* (1971) at iii, 54-68 and VIVIAN CURRAN, *COMPARATIVE LAW: AN INTRODUCTION passim* (Carolina Academic Press, 2002).

29. ZWIEGERT & KÖTZ, *supra* note 4, at 40.

30. Christopher A. Whytock, *Legal Origins, Functionalism, and the Future of Comparative Law*, *BYU L. REV.* 1879, 1880 (2009).

31. JAMES GORDLEY ET AL., *AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW*.

out so much need for translation or cultural immersion—that is to say, without a need for focus on comparison.

But other areas of the law are more attached to a culture, such as constitutional law,<sup>32</sup> family law or criminal law,<sup>33</sup> for example. It is in these areas that we see the points of contention among U.S. Supreme Court Justices in Mary Ann Glendon's lead article. These culturally-dependent areas cannot so easily be understood without a focus on the process of comparison. While the process of comparison could begin without focus on its process, an uncritical juxtaposition will, in short order, employ a comparative theory, such as formalism or functionalism, consciously or unconsciously. In short, the study of any foreign legal system is *not* the same process as the study of one's own system and that study is vastly improved if one is conscious of the differences of cultural approach within the foreign legal system before one carries out the comparison.

In the one hundred or so years that we have recognized "comparative law" as an independent scholarly pursuit, many scholars have concluded that it has been unfortunately rather unproductive. A survey of comparative law literature, both among the practice-oriented authors and among the theory-oriented authors makes two things rather clear from their perspective: first, there is no agreed-upon set of practices or concepts by which one can denote "comparative law," and second, because of the failure to agree on the category, no method or theoretical framework seems to be happening that would enable would-be researchers or practitioners to build a discipline.<sup>34</sup> Mathias Reimann and others have noted the increased interest in comparative law in Europe as part of the Europeanization process of the Single European Act, the Maastricht Treaty and the Lisbon Treaty, but they have also cautioned that the process is concerned largely only with black letter law, viewed positivistically, and advancing private interests. "As

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32. See, e.g., DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM, CASES AND MATERIALS* and JACKSON AND TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW*.

33. Discussions with practicing professional German lawyers who have obtained their masters degrees in law (usually the LL.M degree) have indicated that they chose their curricula based upon cultural interest—hence family law and criminal law—and not just practical, commercial interest. After all, is legal education not intended to be a complete education, not just formal training, *Bildung* and not just *Ausbildung*, in the words of Alexander von Humboldt?

34. Indeed, researchers in the field cannot even agree whether to call themselves "comparativists" or "comparatists."

a result, there is no better theoretical framework in Europe than there is in the United States.”<sup>35</sup>

### C. *Critiques of the Orthodoxies*

Much comparative private law has been written using the functionalist method and it continues to garner quite a following. A considerable amount has also been written as critique of the functionalist method. Criticism comes from several directions against functionalism. A first critique for consideration was launched already back in 1922, long before functionalism was named and introduced. Then, Pierre Lepaulle made a strong case that comparisons are misleading when restricted to *one* legal phenomenon, observing that: “A legal system is a unity, the whole of which expresses itself in each part; the same blood runs in the whole organism. Hence each part must necessarily be seen in its relation to the whole.”<sup>36</sup>

Some of the criticism of functionalism comes from critical legal studies. The now-famous text by Zweigert and Kötz provides a replicable method of functionalism which one might employ as a social scientific tool to achieve respectable comparisons. Social unrest in much of the world in the 1960s eventually made its way to comparative law as well. Through the 1980s and 1990s, comparativists in the critical legal studies movement in the United States were applying social thinking and post-modern theory to the law with the expressed aim of including marginalized and repressed persons’ legal cultures among those to be compared, all the while questioning the orthodoxies that supported a notion of comparative law that one might easily describe as contributing to globalization.<sup>37</sup> I will review some of the critiques made by Günter Frankenberg, Mathias Reimann, and Vivian Curran as just a sample here.

The problem of bias grew into allegations of ethnocentrism by proponents of critical legal studies. Günter Frankenberg offers as a corrective that:

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35. Reimann, *supra* note 3, at 694.

36. Lepaulle, *supra* note 11, at 853.

37. See Udo Mattei, *Comparative Law and Critical Legal Studies*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 815 (Mathias Reimann and Reinhard Zimmerman eds., Oxford University Press 2006).

To cope with ethnocentrism we have to analyze and unravel the cultural ties that bind us to the domestic legal regime. A practical and rather fascinating beginning could be a deviant reading of comparative legal literature focusing on the marginal stuff that is normally skipped for lack of relevance. Forewords and prefaces have iterating stories to tell about how comparison, despite higher aims and claims, is inspired and organized, in part at least, by contingent factors that reveal perspective: the comparativist's legal education and exposure to specific legal cultures honeymoons and travels, invitations to conferences, and so on. The marginal remarks indicate why and how the purportedly objective discovery and comparisons of the 'compared' legal culture is undercut by the comparativist's assumptions.<sup>38</sup>

Where might one see evidence of ethnocentrism in functionality? If we apply an important lesson from comparative law itself to Zweigert and Kötz, we can legitimately examine the perspective from which they see the discipline of comparative law. Part II of their *Introduction to Comparative Law* is divided into contracts, unjust enrichment and torts.<sup>39</sup> Most German readers will readily recognize these divisions as being borrowed directly from the German Civil Code, the *Bürgerliches Gesetzbuch*. Why, for example, is a newer area of the law, such as environmental law not included?<sup>40</sup> Thus, in attempting to provide a science and a method for comparative law that is above or beyond any one system, even the powerful work of Zweigert and Kötz demonstrates that it is impossible to compare without having a point of perspective from which one compares. One cannot step out of the hermeneutic circle, but rather can at best become conscious that one is in the circle, that one sees the world from his place in the circle, and that one tries to make observations of other things in the circle knowing that his is only one perspective.<sup>41</sup> Thus a common law lawyer writing on comparativism might need to invite a civil law lawyer to present the picture from civil law, and vice versa.

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38. Frankenberg, *supra* note 5, at 443 (citation omitted).

39. ZWIEGERT & KÖTZ, *supra* note 4, pt. 2.

40. See, e.g., NICHOLAS ROBINSON ET AL., *COMPARATIVE ENVIRONMENTAL LAW* (2d ed. 2012).

41. See generally RAINER HEGENBARTH, *JURISTISCHE HERMENEUTIK UND LINGUISTISCHE PRAGMATIK* (Athenaum 1982).



By the new century, comparative law might well have reached a new era. Mathias Reimann avers that "comparative law has moved way beyond . . . relatively rudimentary models in at least three regards."<sup>42</sup> First, according to Reimann, we now understand that all classifications are only approximations of reality; second, we have now learned to think of legal systems as legal traditions and not as static and isolated entities; and third, "we have developed at least some understanding of the *interactions* between these legal families, traditions, and cultures."<sup>43</sup> While functionalism has come under criticism—much of it justified—a single, new ship sailing forward upon which to fly the flag of comparativism has yet to emerge. The critical legal studies movement criticized functionalism heavily, but has not put forward an agreed-upon replacement.

Regardless of whether comparative law is conducted as a scholarly pursuit or a practical pursuit, it is often practiced as though from the perspective of the disinterested neutral observer, who is objectively and evenly studying several legal systems, their histories, pieces of their practices or their sources of law. There are several well-founded critiques of such an approach to comparative law. First, one can see that "[i]n the end the neutral observer reveals herself as a lawyer in defense of the status quo."<sup>44</sup> Further, "the comparativist's own 'system' is never left behind or critically exposed to the light of the new. . . . The comparativist travels strategically, always returning to the ever present and idealized home system."<sup>45</sup> That said, much of comparative law since World War II has been conducted in North America or Europe. Consequently, the successes of comparative law in the latter half of the twentieth century can largely be characterized as a tool for the "Europeanization of private law."<sup>46</sup> While new forays in comparative law may be happening recently in Asia, "Latin America continues to be understudied and Africa is almost ignored"<sup>47</sup> even by such flagship comparative law journals as the *American Journal of Com-*

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42. Reimann, *supra* note 3, at 676.

43. *Id.* at 677-78 (emphasis added).

44. Frankenberg, *supra* note 5, at 440.

45. *Id.* at 433.

46. Mathias Reimann, *supra* note 3, at 673.

47. *Id.* at 674.

*parative Law*.<sup>48</sup> And public law does not often get as much ink even within Europe as Asia, Latin America and Africa.

To answer the question of why there has not been work in public or criminal law, it is worth looking at “*The Treaty of Lisbon: an impact assessment, 10th report of session 2007-08*,”<sup>49</sup> published by the European Union Committee of the British House of Lords. In the report, the authors stated that “[o]ne problem we have is that little is known about continental systems of criminal justice. It is an area that has hardly ever been studied. There are no university chairs of comparative law that specialize in comparative criminal procedure, anywhere in the British Isles.”<sup>50</sup>

Vivian Curran not only offers a critique of functionality, she also offers an alternative. She points out that in relying upon functionality, they assume away the object of inquiry.<sup>51</sup> The question “Is there a similar function?” is not asked, according to Curran, but rather it is assumed there is, and the method launches itself from this assumption into determining *what* function is in operation. More importantly, she says Zweigert and Kötz are assuming that it is possible to carry out the old goal of comparative law—to distill a global, common, and unified system of private law—and to do so, they begin by assuming they will find similarities. This critique is like that of the old-time magician, who claims to be able to pull a rabbit from his hat, only because he knows he has already put the rabbit in the hat.

If one is attempting something like an objective or neutral science of comparison, it is indeed peculiar to advocate beginning from a perspective that is admittedly biased toward finding similarities, just as it would be to acknowledge and employ a bias in search of differences. Yet there does not seem to be much reflection on the quick abandoning by many comparativists of both the attempt at a neutral scientific vantage point of observation and an exploration of the biases of their own vantage point.

Curran’s critique is related to a more general critique based upon the “identity-difference principle.” In the identity-difference

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48. One count of articles published from 1952-1997 of that journal contained 41.12% about Europe, 8.6% about Asia and only 1.79% about Africa, see Upham, *The Place of Japanese Studies in American Comparative Law*, 1997 UTAH L. REV. 639, 641 (1997), in Reimann, *supra* note 3, at 674 n.12.

49. HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, *THE TREATY OF LISBON: AN IMPACT ASSESSMENT, 10TH REPORT OF SESSION 2007-08*, 2008, London: Stationary Office, at E-131 (2008).

50. *Id.*

51. CURRAN, *supra* note 28.

principle, it is said that for any two phenomena, one can of course find one basic similarity (they exist, they are both made of molecules and so on), and also at least one difference (even two pencils, mass-produced and side-by-side, do not exist in the same physical space, for example).<sup>52</sup> Curran's preferred alternative mode of comparison is through immersion in the new legal culture.<sup>53</sup>

Much of the work in comparative law compares civil law problems and solutions with common law problems and solutions. Here too, a type of legal ethnocentric bias is possible. Civilists, due to the structure of civil legal systems might assume that all of law must be capable of a grand, unifying system not because comparative law must be able to make that possible, but because civil law behaves that way. As a result, civilists might conclude that "Only the Continental systems, with their tendency to abstraction and generalization, develop the grand comprehensive concepts, while the common law, with its inductive and case-by-case habits, produces low-level legal institutions especially adapted to solve isolated, concrete problems."<sup>54</sup>

Even at the height of critical legal studies, and after a long and convincing exposé of the weaknesses of comparative law in practice, Günter Frankenberg concluded that:

To abandon comparative legal studies would be wrong-headed, I think, for it would freeze the tradition and current conditions into an eternal pattern. It would be equally wrong to go on with a comparative muddling-through. And from reading through the various approaches and from such highlights as Pound's *Comparative Law in Time and Space*, I infer that it is not just a more complex and longer process of comparison that is needed. Comparative law never had too little baggage in the overhead compartment. To this very day it is crammed with thoughts and oughts, with aims and claims.<sup>55</sup>

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52. Here one must be careful not to engage in the sophomoric practice of "compare and contrast," as a substitute for comparative method. Simple juxtaposition is not the comparative method. I am reminded of a colleague who once observed that most papers presented at academic conferences could be boiled down to one of two themes: "X and Xa may appear to be similar, but I will show you how they are really different," or "X and Xa may appear to be different, but I will show you how they are really the same."

53. CURRAN, *supra* note 28.

54. Frankenberg, *supra* note 5, at 440.

55. *Id.*, at 441.

Curran's work guides things in the direction of addressing the language questions of comparative law, and away from pure discussions of method or ideology. There are other current perspectives of course that adhere to neither functionalism nor critical legal studies thinking, like that of Bernhard Grossfeld. Grossfeld not only offers his own method, but presents a critique of orthodox comparison method, while addressing the core questions.<sup>56</sup> In Grossfeld's critique, he unequivocally states that "[t]o give order to connections and to render them comprehensible also is the scholarly duty of comparative law."<sup>57</sup> He says that "we should not take the functional method too narrowly."<sup>58</sup> He goes on to write that comparison in the mode of translation not only has all the advantages of immersion over functionalism, but also has the added advantage of being more easily executed by the comparativist.<sup>59</sup>

Bernhard Grossfeld instead mobilizes translation as method for comparative law.<sup>60</sup> But he means more than an analogy. Whereas I made the analogy above to comparative law as translation, Grossfeld would say, for example, that Eastern law, like pictograms, is not comprised of language, but is instead right brain thinking and therefore not comparable to other legal systems in which law is language-based.<sup>61</sup> Elsewhere, Grossfeld notes that law:

[A]rises much the way language does, as was so clearly pointed out by Friedrich Karl Savigny, who stated early in his classic work: In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward ne-

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56. See GROSSFELD, *supra* note 7.

57. *Id.* at 93.

58. *Id.* at 7.

59. *Id.*

60. *Id.* at 89-104.

61. Jack A. Hiller & Bernhard Grossfeld, *Comparative Legal Semiotics and the Divided Brain: Are We Producing Half-Brained Lawyers?* 50 AM J. COMP. L. 175 *passim* (2002).

cessity, excluding all notion of an accidental and arbitrary origin.<sup>62</sup>

Bernhard Grossfeld seems to allow the *praesumptio similitudinis*, but then offers both a critique of functionalism and an alternative that he builds through language study. Insofar as he allows for the *praesumptio similitudinis*, one could level that same critique against Grossfeld, who posits that comparative law should be focused not on the differences, but on the perceived commonalities: "They form intercultural 'bridges,' enabling agreement across borders. If we total up the differences, we distort the picture. Comparative law first and foremost must be 'bridge seeking' and 'bridge building.'"<sup>63</sup> The "must" in that statement is of course a matter of choice.

He tells us to remember the process of learning any second language. It was mechanical—one learns the structure of grammar and then inserts as much vocabulary as one can memorize. That is not how we learn our native language. In addition, when learning languages after the mother language is learned, we do so by comparison to our own first language. But beyond my analogy in which learning another legal system is *like* learning another language, Grossfeld maintains that learning another legal system is learning another language, for we accomplish this practice of comparison by *creating*—not finding—relationships that we say are equal. In the same way that we cannot learn a second language as we learned our mother tongue (with the exception of course of those who have learned a second language at early age and are truly bilingual), we must at least become conscious of these realities of learning by translation, and not fool ourselves into believing that we can learn another culture, even a legal culture, simply by reading the same texts that a native reads.

By seeing the act of comparison as an act of translation, "[c]omparative law goes beyond textual comparison into order and relationship comparison."<sup>64</sup> According to Grossfeld, "the reading of a foreign legal text often gives us a false picture. . . . In order to avoid this, we need to recognize the context of the text. Yet we are

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62. Jack A. Hiller & Bernhard Grossfeld, *Comparative Legal Semiotics and the Divided Brain: Are We Producing Half-Brained Lawyers?*, 50 AM J. COMP. L. 175, 178-79 (2002) (quoting FRIEDRICH CARL VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 24 (1814) (A. Hayward transl., 1975)) (internal quotation marks omitted).

63. GROSSFELD, *supra* note 7, at 12.

64. *Id.* at 125.

not able to observe foreign contexts in an unbiased way, for each system responds to observation, observes itself.”<sup>65</sup> Grossfeld connects the science of comparativism to the natural sciences when he cites physicist Werner Heisenberg: “the connection between two different closed conceptual systems always must be a very painstaking analysis.”<sup>66</sup> Grossfeld observes that “comparative law ‘is not for ‘clever boys’ or ‘clever girls.’ It requires patience and the capacity to empathize.”<sup>67</sup> Elsewhere he adds: “Only rarely does one read anything about the execution [of law] in practice. We remain thus always at risk of taking the representation for life, and dead law for living law.”<sup>68</sup>

Like natural languages, we all begin our lives doing everyday things within our own legal system. We typically spend years in that system, accumulating knowledge of it in the same way as other laypersons before we ever begin to study it scientifically or professionally. Thus the categories in our mind called ‘language’ or ‘legal system’ are in fact biased by the fact that we have learned our language and our legal system, not some neutral category called ‘language’ or ‘legal system,’ and we thus learn any second language or legal system by translating it into our own. This is not a disastrous state of affairs, so long as we remain conscious of it. But if we assume that our legal system is in some way *the* legal system, with some sort of natural or objective connection to the world, then we have made the same error as if we had assumed the same about our spoken language.

Grossfeld begins the final chapter of his work with a discussion of method:

We have dealt with some basic problems of comparative law; we found ways to approach them, but we did not find sure answers: Great tasks lie ahead for comparative law; it must let itself be challenged if it wants to win the future in a world that is not European in imprint. A technical-functional comparison without a study of national customs, without cultural-research and without loving empathy (Bernhard von Clairvaux . . . : *Res tantum intelligitur quantum amatur* (a matter is understood to the extent that it is loved)) remains a

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65. *Id.* at 90-91.

66. WERNER HEISENBERG, *PHYSIK UND PHILOSOPHIE* 77 (1984) as quoted by GROSSFELD, *supra* note 7, at 110.

67. GROSSFELD, *supra* note 7, at 110.

68. *Id.* at 91.

study of words, letters and numbers, touches only the superficial level and leads into error.<sup>69</sup>

Grossfeld's disquisition on what he calls the core questions of comparative law are the closest that one comes to a focus, or re-focus on issues of the act of comparison, rather than a focus on the laws themselves or ideological problems. This focus on comparison leads me to offer one of my own.

## II. RHETORIC AND LAW

Lawyers know law. Lawyers are trained in law according to the particular structures and institutions of the society in which they are trained. Formalism and functionalism focused upon sources of law. Critical legal studies insisted that the social and cultural ideologies of the source state and the target state (to borrow terms from translation studies) must be part of the comparison. While the critical legal studies lesson is of course culturally valuable and fair, it threw the sense of unity that functionalism had accomplished back into a situation of multivariance, which unsurprisingly makes it difficult for scholars to feel there is a single, unified science that builds on this work. Rather than look for a unifying theory of law through which to achieve a sense of building, I suggest we focus on the act of comparison itself.

Mathias Reimann, after surveying comparative law literature, concluded that "The problem is that these books, articles, ideas, and critiques do not add up to a sum that is larger than its parts. Instead, they constitute a potpourri of disparate elements that coexist side-by-side but rarely relate to any overarching themes."<sup>70</sup> It is my contention that the lack of unity to which Reimann and others allude in the development of comparative law is due to focusing on the laws, instead of comparison itself. Even those relatively few scholars who have attempted to focus on comparison, have typically done so without reference to a solid disciplinary foundation for comparison. To improve upon the discipline, I would therefore put forward an established foundation to facilitate the task of comparison that is thoroughly related to civil, ecclesiastical and common law. A thorough and considered reflection on the act of comparison in human thought has been available to Western culture since the fourth century B. C. Comparison may

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69. *Id.* at 245.

70. Reimann, *supra* note 3, at 686.

well have been discussed earlier and elsewhere, but it comes to us best preserved through Aristotle in his work, *Rhetoric*. In an age in which we have scientized all that we think about human thinking, one might question why we should bother with pre-Enlightenment liberal arts when trying to understand comparison. The mere fact that comparison is explicitly considered at all by Aristotle, the most-cited author of all time,<sup>71</sup> over an entire chapter of his work, ought to be reason enough to consider the impact of what he has to say about comparison. But more to the point of comparative law, it was the discipline of rhetoric up to, and through the medieval trivium, that was a basic part of the education of civil, ecclesiastical and common law lawyers. I will first address the connections of the discipline of rhetoric to law, then return to the specific treatment of comparison within the discipline of rhetoric.

A lesson learned from the study of comparison is that although focus upon, and critiques of presumptions of similarity or difference are capable of locating material to compare, they are just the beginning of the comparison process. Most comparison is made difficult precisely because there are both differences and similarities between any phenomena under examination, and so much more focus needs to be placed upon the “degrees” of difference and similarity, as Aristotle called them. As Mary Ann Glendon notes in the lead article to this volume, “After all, most cases that reach the Supreme Court involve choices between positions that are supported by weighty moral and legal arguments, and the Court more often than not must make choices that, either way, will entail substantial individual or social cost.”<sup>72</sup> In other words, all the discussion about whether to proceed from the presumption of similarity or difference is misleading. Most, if not all cases are both similar and different by matters of degree, and the choices must be made on grounds beyond simple categorical similarities or differences. In the fourth century B. C., Aristotle had already writ-

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71. RICHARD F. HAMILTON, *THE SOCIAL MISCONSTRUCTION OF REALITY: VALIDITY AND VERIFICATION IN THE SCHOLARLY COMMUNITY* 277 n.38 (1996) citing Eugene Garfield's studies in the 1970s and 1980s of nearly a million citations in the *Arts and Humanities Citation Index*. Garfield did count more citations to Marx in one study, but added that half of those citations were limited to philosophy journals and nearly two-thirds of those come from one journal *Deutsche Zeitschrift für Philosophie*. Aristotle's work can be said to have formed the basis of Jewish, Christian and Muslim Medieval philosophy, according to Robin Smith, *Aristotle's Logic*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Mar. 23, 2011), <http://plato.stanford.edu/entries/Aristotle-logic>.

72. Mary Ann Glendon, *Law in the Age of Globalization*, 52 *DUQ. L. REV.* 11 (2014).



ten on comparison. In Book I, chapter 7 of his *Rhetoric*, he focused on comparison by the degree to which things were comparable. After "determining the sources from which we must derive our means of persuasion about good and utility,"<sup>73</sup> Aristotle writes that "[s]ince however it often happens that people agree that two things are but useful but do not agree about which is the more so, the next step . . . will be to treat of relative goodness and relative utility."<sup>74</sup>

Aristotle's discussion of making comparisons by degree then runs through seven exercises. First, a greater number of things can be considered more desirable than a smaller number of the same things. Second, that which is an end is a greater good than that which is only a means. Third, that is scarce is greater than that which is abundant. Fourth, what a person of practical wisdom would choose is a greater good than what an ignorant person would choose. Fifth, what the majority of people would choose is better than what the minority would choose. Sixth, what people would really like to possess is a greater good than what people would merely like to give the impression of possessing. Seventh, if a thing does not exist where it is more likely to exist, it will not exist were it is less likely to exist.<sup>75</sup> Since the Enlightenment, we have tended to want to quantify degrees of difference and make our choices based upon numbers. That too might be helpful, but not all differences and similarities of degree are quantifiable, so we are still left with the task of choosing when qualities differ. One may well ask whether these conceptions of comparison have ever been applied directly to law. There are strong implications that it has.

The relationship to law comes about because\at the beginning of what we now know as both the university and the common law, rhetoric featured heavily in all upper-level education. The curriculum in Bologna and at Oxford that same century would have consisted of the liberal arts, beginning with the trivium of rhetoric, logic and grammar.<sup>76</sup> These three subjects were the most im-

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73. ARISTOTLE, *Rhetoric*, in THE COMPLETE WORKS OF ARISTOTLE I.6.1363bb3-4 (W. Rhys Roberts, trans., Jonathan Barnes, ed., The Revised Oxford Translation, 1985).

74. *Id.* at I.7.1363b5.

75. See EDWARD P.J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 97-99 (4th ed. 1999).

76. See H. RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES (3 Volumes, F.M. Powicke, A.B. Emden eds., 2nd ed. 1936).

portant of the seven liberal arts for medieval students.<sup>77</sup> If a student wished to continue, then he could study the arts of harmonics, geometry, arithmetic and astronomy.<sup>78</sup> Furthermore, Irnerius himself had already been teaching rhetoric at Bologna when he went to Rome and returned to Bologna, bringing his idea of teaching jurisprudence, and founding the first civil law school of jurisprudence in 1084.<sup>79</sup>

In the eleventh and twelfth centuries, European jurists revived Roman law that had not been practiced for centuries. Their methods were similar to what theologians of the time were using to systematize and harmonize the Old Testament, the New Testament, the texts of church fathers and other sacred writings. Importantly, these jurists “took as a starting point the concept of a legal concept and the principle that the law is principled.”<sup>80</sup> Furthermore, “[t]he conceptualization of general legal terms, like the formulation of general principles underlying the legal rules, was closely related not only to the revived interest in Greek philosophy but also to developments in theology. . . .”<sup>81</sup> And they practiced comparativism in constructing the general legal principles. Not only did they practice comparativism, it was the heart of their newly-established legal science.

There were connections between the developments in evidence, namely the proof of facts in court, with the study of rhetoric itself. Today, one often disparages the word “rhetoric” by calling it “mere,” “only,” or “just” rhetoric, thus limiting reference to the connotation of empty speech. But at that time, rhetoric still referred to the Aristotelian connotation of persuasion by appeal to reason. With the twelfth century, the historical record reveals that increasing emphasis was placed on method, including the method of proof. “The concept of the hypothesis was put forward by the rhetoricians to supplement the dialectical concept of the thesis (*quaestio*). Proof of hypotheses was understood to require the presentation of evidence, which in turn implied the notion of probable truth.”<sup>82</sup>

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77. R.S. RAIT, *LIFE IN THE MEDIEVAL UNIVERSITY* 138 (1912).

78. *Id.*; see also 1 G. LEFF & J. NORTH, *A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN THE MIDDLE AGES*, (W. Ruegg, ed., 1992).

79. Michael Ott, *Irnerius* in *THE CATHOLIC ENCYCLOPEDIA*. (Vol. 8. New York: Robert Appleton Company 1910), available at <http://www.newadvent.org/cathen/08168a.htm> (last visited October 3, 2013).

80. BERMAN, *supra* note 1, at 150.

81. *Id.*

82. *Id.* at 154.

Thus it was with the realities of presenting real evidence, not theoretical propositions, courts and rhetoricians alike were faced with uncertainties. Presumptions took on the importance of logic. Rules of evidence had to be established. "The parallels with law were stressed: A well-known treatise of the twelfth century, *Rhetorica Ecclesiastica*, stated that 'both rhetoric and law have a common procedure.' The same treatise defined a case (*causa*) as a 'civil dispute concerning a certain statement or a certain act of a certain person.'<sup>83</sup> Here one can see the development of a legal case in much the same way that the concept of an hypothesis had been developed in rhetoric. The *Rhetorica Ecclesiastica* additionally asserted that to find the truth of a disputed matter a judge, a witness, an accuser, and a defender were all required. Rules of relevancy and materiality were developed and by the early thirteenth century exclusionary rules had been developed.<sup>84</sup> "Alessandro Giuliani has shown that this system of 'artificial reason' of the law was discarded in most countries of Europe after the end of the fifteenth century and replaced by 'natural reason,' which emphasized mathematical logic."<sup>85</sup> But, most important for we common law lawyers is that Giuliani's work also shows that despite the Enlightenment impact of Thomas Hobbes and others in England, in English common law, the system of so-called "artificial reason" survived through the efforts of Edward Coke, Mathew Hale, and their successors."<sup>86</sup>

The connection of rhetoric to the medieval study of civil law is not the entire picture, however. As we know, the medieval common law lawyer was not educated at the universities of Oxford, Cambridge or London, but rather at the inns of court. Therefore, in order to be able to make the claim that the medieval lawyer was educated in rhetoric, one cannot just assume so as a result of university education. "A realistic point in time to begin a discussion of Anglo-American legal history, then, is with the common law as it stood when it first became the object of study by a distinct legal

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83. "Causa est civilis disceptatio de certo dicto vel facto certae personae," as quoted in BERMAN, *supra* note 1, at 154. (citing Alessandro Giuliani, *The Influence of Rhetoric on the Law of Evidence and Pleading*, JUDICIAL REV., 62, 231 (1969)).

84. BERMAN, *supra* note 1, at 155, again referring to Giuliani, *supra* note 83, at 234-35. Berman comments further in the note that "These rules of relevance were applied first to the propositions (positions) to which parties and witnesses swore oaths and later to the allegations (articuli), proved through witnesses and documents, which gradually replaced the older form as oaths were devalued."

85. BERMAN, *supra* note 1, at 154-55 (citing Giuliani, *supra* note 83, at 237).

86. *Id.*

profession . . . .”<sup>87</sup> One could best say that the practice of law became an exclusive profession by edict of Edward I. I am persuaded by the legal historian Kempin when he offers that:

Perhaps the crucial event in the beginning of the legal profession was an edict issued in 1292 by Edward I. At that time what passed for a profession was in a sorry state. Legal business had increased tremendously; yet there were no schools of the common law, and the universities considered law too vulgar a subject for scholarly investigation. Edward’s order directed Common Pleas to choose certain ‘attorneys and learners’ who alone would be allowed to follow the court and to take part in court business . . . . The effect of putting the education of lawyers into the hands of the court cannot be overestimated. It resulted in the relative isolation of English lawyers from Continental, Roman, and ecclesiastical influence.<sup>88</sup>

But did it result in them not being trained in rhetoric? And if not, did they then not have the training and experience of understanding the role of comparison as a commonplace? The university system may seem remote from the inns of court and chancery at first glance. “It would have been strange, however, if the educational notions of Paris, Oxford and Cambridge, which were taken for granted in university circles, had no influence in London. And we believe that in truth the obvious differences are outweighed by obvious similarities.”<sup>89</sup> Given what we know of the medieval education in the trivium, we can therefore go one step further and assume<sup>90</sup> the similarities would have included an exposure to rhetoric for the students of the inns.

While I take it as undeniable that the education, language, procedure and norms of the English legal system greatly influenced the American legal system, it remains for me to make explicit that would include English legal education, such as it was in the early days, regardless of whether we can find explicit one-to-one bridges to American usage. The study of rhetoric often presupposes that a

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87. Kempin, *supra* note 8, at 3.

88. *Id.* at 79.

89. J. H. BAKER, *THE LEGAL PROFESSION AND THE COMMON LAW* 9 (1986).

90. We are forced to make assumptions because the first record of the inns is not until 1388, do we have a written record of the goings-on at the inns, as Baker indicates. Prior to that, “The most we can say with confidence is that the town-houses where the apprentices of the Bench lived in term-time had acquired by the 1350s educational as well as purely residential functions, and the inns had thereby become societies.” *Id.* at 3.

speaker, such as a student, is in need of help in composing a speech, while law will assume the material that might be under discussion is extant and already known and available for comparison. Thus, "both Cicero and Quintilian maintained that the most valuable background for an orator was a liberal education because they recognized that such a broad education was best calculated to aid a person faced with the necessity of inventing arguments on a wide variety of subjects."<sup>91</sup> With centuries of recorded experience and observation behind them, the rhetoricians noticed that for a given culture, reflection, education and reading would lead to "'places' where certain categories of arguments resided."<sup>92</sup> Rhetoric is cognizant that this social phenomenon is subject to change over time and place, but when one properly observes where these places are here and now, his or her argument will have greater resonance with the audience of that time and place. The system by which one can know these places is the topics. "The rhetoricians saw, for instance, that one of the tendencies of the human mind is to seek out the nature of things."<sup>93</sup> So they identified "definition" as a topic.

"Another tendency of the human mind is to compare things and when things are compared, one discovers similarities or difference—and the differences will be in kind or degree."<sup>94</sup> In this simple exercise, the rhetoricians see that one must first know his purpose in order to determine if it presents an opportunity for definition or comparison. Thus, consistent with the orthodoxy of Zweigert and Kötz, one must ask why one is comparing, rather than assume that comparison is natural, normal or inevitable. As Quintilian said, "it is no use considering each separate type of argument and knocking at the door of each with a view to discovering whether they may chance to serve to prove our point, except while we are in the position of mere learners."<sup>95</sup> According to Edward Corbett, "Quintilian envisioned a time when, as the result of study and practice, students would acquire that "innate penetration" and "power of rapid divination" which would lead them directly to those arguments suited to their particular case."<sup>96</sup>

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91. CORBETT & CONNORS, *supra* note 75, at 85.

92. *Id.*

93. *Id.* at 86.

94. *Id.*

95. V QUINTILIAN, *INSTITUTIO ORATORIA* x, 122 (Harold Edgeworth Butler trans. Harvard University Press 1921), as quoted by CORBETT & CONNORS, *supra* note 91, at 86.

96. *Id.* at 86.

Insofar as the students' powers, as described by Quintilian, enabled them to read different cultures differently in different places and times, the question for law becomes whether now, in an era known as globalization, is the time for comparison in looking for legal solutions to social problems? My question takes the lessons of rhetoric for the student seeking to write a speech and applies them to a lawyer in search of solutions for his client and the legal scholar in search of system wide solutions for his systematic legal problems.

### III. THE FOCUS ON COMPARISON APPLIED

In his assessment of the style of writing judicial opinions, Sir Konrad Schiemann, a judge on the European Court of Justice (ECJ), and formerly a judge of the High Court in England, made a subtle but scientifically important conclusion. Throughout a short article, he compared writing judgments in England to those of the ECJ, using the criterion of style in his explorations and explanations. In the end, however, his comparison made a conclusion based not only upon style as an isolated criterion, but upon social purpose *relative to the stated purpose of the court*. And from that assessment, he concluded that: "the ECJ's practices have the advantage over English practices—at any event for the task that this court has to fulfill. I have the feeling that there is a genuine attempt to arrive at the best common solution that the brains of the court can reach."<sup>97</sup>

In her review of the three U.S. Supreme Court cases of *Roper v. Simmons*,<sup>98</sup> *Lawrence v. Texas*,<sup>99</sup> *Washington v. Glucksberg*,<sup>100</sup> Professor Glendon lays out the disparate positions of Justices Breyer and Scalia.<sup>101</sup> She notes that the debate seems to be about the propriety of foreign norms in American culture, but in practice might have much more to do with the balance of power between courts—especially the U.S. Supreme Court—and the state legislatures. She points out that Justice Breyer ought to have noticed that the foreign norms were legislated, not opined by the courts, and that that difference mattered when it came to implementation or the "starting point," as Justice Breyer calls it, of foreign

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97. Schiemann, *supra* note 21, at 741- 49, 747.

98. 543 U.S. 51 (2005).

99. 539 U.S. 558 (2003).

100. 521 U.S. 702 (1997).

101. See Glendon, *supra* note 72.

norms. She further cautions that foreign law should be used with attention to detail of its own particulars, rather than transpose assumptions from one's own particular system. That is of course a solid critique. We might go further.

Many other jurisdictions in the world now have a separate constitutional court, although unlike the United States, the names and reputations of the individual judges on those courts remains largely unknown. But more importantly, the majority of the world's jurisdictions are based on the civil law tradition. I would not bother to trot out the mechanics of *stare decisis* and say that is of utmost importance here. There is something I regard as less mechanical, but more powerful. The citizens of civil law jurisdictions do not expect authoritative interpretations of legislation from their judges. When they seek it at all, they seek it from scholars in the field. So just as Justice Breyer ought to have noticed that foreign countries' norms on juvenile death penalties or homosexual acts are legislatively-determined, it should also be noted that they are most often legislatively-determined in civil law countries where no one would expect explication of norms by courts anyway.

Judge Schiemann's surprising article on judicial style suggests something further to be said about the judicial opinion as a forum in which a common law judge may expound on legal theory in ways that legislators cannot. Legislators may make records of deliberations in various jurisdictions of the world, just as the U.S. Congress does with the Congressional Record, but those records are not law. The common law judicial opinion, however, is law.

#### IV. CONCLUSION

The problem (or "exigency" as rhetors would call it) that I have attempted to address is the lack of focus on comparison in the study and practice of comparative law. This problem has become more severe with each increment of unreflective globalization, including in our legal practices. Treating comparison as a common topic helps us to minimize the rabbit-in-the-hat searches for similarities and differences, within and apart from functionalism, and focus instead on comparisons by degree. Looking at the cases provided by Mary Ann Glendon in this volume, not only might we conclude that Justice Breyer missed the fact that the other jurisdictions accomplished the norms in question through the legislature, but by applying the distinction of degrees from Aristotle, we would also see that other jurisdictions accomplished their distinc-

tions with a public that does not expect judges to make or interpret norms. And legislatures do not and cannot include their legal theories and rationale within the legislation itself. The disciplined study of problems and solutions to comparisons by degree have been available for millennia. Globalism is an exigency that warrants the focus of law upon comparison.



